NO. 42149-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER JOHN DUNNE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01830-1

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# BRIEF OF RESPONDENT

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*1. Procedural history*

The State charged Christopher Dunne by Amended Information with six counts. CP 162-65. The alleged victim in each count was Crystal Engle. Id. He was convicted of Count 2, assault in the second degree. Count 3, assault in the second degree, Count 4, assault in the second degree with sexual motivation, Count 5, rape in the third degree, and Count 6, assault in the third degree. CP 309-14, 320. The jury also found

the existence of eleven aggravators. CP 315-28. Following sentencing, the defendant filed this timely appeal. CP 467.

2. *Pre-trial motion to continue*

The State notified defense counsel on March 15, 2011 that it would be calling Dr. Marilyn Howell, an expert in the cycle of domestic violence and learned helplessness. CP 168-69, RP 88-95. The defendant moved to continue the trial so that he could find an expert who would testify that because Crystal remained in the relationship with the defendant, it proved that she could not have been abused by him. RP 89-90. The court asked: "Do you think there is any such expert in the world?" RP 90. Defense counsel merely replied "I'm hoping there is." Id. The court held that the concepts of the cycle of domestic violence and learned helplessness have been around for twenty-three years and are "not novel; it's not new." RP 94. The court went on to discuss the scheduling difficulties that had to be overcome to ensure that the case would go to trial on the appointed trial date (March 21, 2011), and observed "I'm not told any such expert even exists." RP 95. The court denied the motion to continue, inviting defense counsel to renew it on or before trial if he found an expert who would

deny the concept of learned helplessness. Id. Defense counsel did not produce such an expert, either before or after the trial.[1]

After trial, the defendant made a motion to arrest judgment dated March 31, 2011. CP 348-365. Although he complained that he was not granted a continuance to seek a domestic violence expert, he still had not found one. Id. Then, on April 18, 2011 the defendant supplemented his motion with a declaration by defense counsel that counsel had spoken with a local psychologist, Dr. Kirk Johnson, who would offer testimony about the victim's veracity. CP 388-89. Specifically, Dr. Johnson would complete a "forensic assessment" of Crystal Engle and then render an opinion on whether she was truthful. Id; RP 798-803. Defense counsel did not speak to Dr. Johnson April 18, 2011, nearly a month after trial. CP 388. The trial court denied the motion to arrest judgment and for new trial, noting that defense counsel hadn't contacted this "expert" until nearly a month after trial, that the expert would not refute the testimony of Dr. Howell (which was Dunne's purported reason for seeking an expert), and, finally, "[t]he idea that he would do a full psychological workup is nonsense. I would never allow that. There is no basis for that." RP 803.

[1] Although defense counsel subsequently produced an expert for her motion for a new trial, this expert would not have disputed the testimony of Dr. Howell but rather would have performed a "forensic assessment" of the victim to determine whether or not she was lying. See CP 389; RP 798-803.

The defendant's motion to arrest judgment and for new trial was also denied. RP 803-04.

3. *Trial testimony*

Crystal Engle and the defendant, Christopher Dunne, began dating in March of 2009. RP 160. Near the end of September, 2009 Crystal moved in with the defendant at his parents' home. RP 160-61. On December 31, 2009 Crystal celebrated New Year's Eve with her family at her parent's home, but eventually met up with the defendant at a friend's house. RP 169. When she found the defendant he was both intoxicated and behaving belligerently. RP 171. They remained at their friend's house until about 1:00 or 1:30 in the morning and then returned home. RP 172. When they returned the defendant insisted on playing his radio very loudly and Crystal asked him to turn it down out of consideration for the other people in the house. RP 173. The defendant refused, and Crystal sought help from the defendant's sister and, eventually, his mother to get him to turn the music down. RP 173-74. After that argument, which lasted about an hour, the defendant was agitated and frustrated. RP 174-75. He joined Crystal on the bed where he sat on top of her chest and began licking her face. RP 175. Crystal asked him to stop but he refused. Id. Crystal then bit his tongue, in a playful way to get his attention and get him to stop. Id. The defendant flew into a rage and said that because she had hurt him, he

was now going to hurt her. RP 175-76. At that point the defendant began strangling Crystal while she lay flat on her back with him on her chest. RP 176. She felt light headed and couldn't breathe. RP 177. He then began hitting her on the face and she begged him to stop, telling him he was hurting her. Id. She felt like her "head was going to cave in." He finally got up when she told him she couldn't breathe. Id. The defendant told Crystal "I just hate you." RP 177. Crystal testified that during the strangulation it was difficult to breath, her throat hurt, her ears were ringing and her head was pounding. RP 179. She was surprised she didn't urinate on herself again, as she had in a previous incident of strangulation. Id.

Crystal's friend Amanda saw her two days after this assault and noticed bruises on her neck. She also noticed that her eyes were bloodshot. RP 324-25. Crystal's friend Sandra observed the same injuries. Id. Crystal saw her mother two days after the assault and noticed the same injuries. RP at 342-43. She confronted Crystal and Crystal told her that she had fallen. RP 343-44. Her mother called the police but Crystal didn't want to make a police report. RP 345-46. Crystal was very upset with her mother for calling the police. Id. In May of 2010 the defendant again strangled Crystal. RP 192-93. They were in their bedroom getting intimate and the defendant wanted Crystal to submit to anal sex. RP 193-94. Crystal lied

and said she had to go to the bathroom and locked the bathroom door. RP 193. After about fifteen minutes the defendant began knocking on the door. Id. She didn't want him to wake up his parents so she let him in. RP 194. She told him she didn't want to have anal sex and he said "that's fine." Id. But when they began having sex again, he again demanded anal sex and when she refused, he strangled her from behind with his forearm. RP 195. She began gasping for air and passed out. Id. She woke up lying on the bathroom floor in a puddle of her own urine. Id. When she told the defendant he had made her urinate he said "are you serious?" RP 196. Then he got dressed and went to bed where he passed out. Id.

Crystal testified she was in love with the defendant. RP 197. She testified that she believed him when he told her he was sorry and it would get better, and "it wasn't like things were happening every day. It was every, like, couple of months...So then, I would fall back into that slump." RP 197.

On July 11, 2010, the defendant raped Crystal and caused her serious physical injury. RP 200-203. They had been over at a friend's house having drinks. RP 200. The defendant was very drunk. Id. When they returned home they began having sex. Id. The defendant wanted to "try something new. He wanted to fist me." RP 200. Although she initially agreed to let him insert a couple of fingers in her vagina, it progressed to

the point where it hurt and she asked him to stop. Id. The defendant became "turned on" by her expression of pain. Id. She kept asking him to stop and telling him it hurt and the defendant kept saying "Just a little bit more." RP 201. She was in constant, burning pain during this time. RP 202. She finally succeeded in pulling his fist out of her vagina. Id. She was bleeding profusely and it wouldn't stop. RP 203. The defendant, for his part, flipped the bloody mattress over and passed out on the couch. Id. Crystal realized she needed to go the emergency room and placed a towel under her vagina for padding. Id. She told the defendant she needed to go to the emergency room and the defendant gave her $8.00 and said "Call me and let me know what they say," and then passed out again. RP 203-04. Crystal drove herself to the emergency room. RP 204.

Dr. Herzig treated Crystal in the Emergency Department of Legacy Salmon Creek Medical Center. RP 211-12. He is an Ob-Gyn physician. RP 211-12. He determined that she had a five inch, full thickness tear in her vagina. RP 215-16. It had to be repaired surgically, and Crystal had to be put under anesthesia. RP 215-16, 218. The tear was still actively bleeding when surgery began. Id. The injury was a "significant tear." RP 217. Crystal's injury was comparable to those seen during childbirth where a woman's labor is "incredibly fast" and there is insufficient time to allow the baby's head to stretch the opening. RP 218. When Dr. Herzig

asked Crystal what had caused her injury she said "they were having sex and they were too rambunctious and energetic and so it had happened." RP 213.

During cross examination, defense counsel sought to ask Dr. Herzig whether he believed, "to a reasonable medical standard, more likely than not, that her injury is the result of consensual sex?" RP 225. Dr. Herzig began answering the question by seeking clarification: "You are asking me if, based on medical knowledge, I think this injury resulted from consensual sex?" RP 226. Defense counsel replied "On a more likely than not basis." Id. Dr. Herzig began his answer but was cut off by defense counsel who asked the trial court for permission to put forth the defendant's version of events in a hypothetical. Id. The trial court then ruled that the question defense counsel had posed was not proper because "[T]o get into consent he has to be commenting on the mind frame of the participants. Different question, please." Id. At that point defense counsel chose to end his cross examination. Id.

The defendant presented seven witnesses in his case, and he testified on his own behalf. RP 424-621. The defendant denied ever strangling Crystal Engle. RP 569-621. Regarding Count 2, the assault that occurred on December 31st, 2009, the defendant testified that when he and Crystal returned home that night they were getting intimate and he began

licking her face. RP 581. He testified she "wasn't really liking it" and so she bit his tongue. RP 582. He became angry and "backhanded" her in order to get her to release his tongue. RP 582-83. He claimed they then got on their pajamas and that prior to getting into bed "I heard a thump and then her scream, 'Oow!' I got back up, turned the light on, went and looked at her and she had a line through her face and it was red." RP 586. During cross examination the defendant admitted that it was clear to him that Crystal didn't want him to lick her face but he continued to do it anyway. RP 610. Regarding Count 4, assault in the second degree with sexual motivation,[2] the defendant testified that he "finger banged" the victim with three fingers. RP 591. He testified that after the victim had an orgasm he got dressed and noticed blood on his hands. RP 592. He said he got her a towel and she held it to herself for five minutes but the bleeding didn't stop. RP 592-93. She was bleeding on the bed. RP 592. The defendant testified that everything was "fine" until they "realized" Crystal was bleeding. RP 593. When the bleeding wouldn't stop Crystal said "We need to go to the emergency room." RP 594. The defendant refused to go to the emergency room with her. RP 594. Instead, he offered to ask his

[2] The defendant was convicted of three counts arising from this incident: Count 4, assault second degree with sexual motivation, Count 5, rape in the third degree, and Count 6, assault in the third degree. Counts 5 and 6 merged with Count 4. CP 452.

mother to take her. RP 594. Crystal ended up driving herself to the hospital, according to the defendant. Id.

## C. ARGUMENT

### I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION TO CONTINUE.

The decision to grant or deny a motion for continuance rests with the sound discretion of the trial court and is reviewed under an abuse of discretion standard. *State v. Downing*, 151 Wn.2d. 265, 272, 87 P.3d 1169 (2004), *State v. Miles*, 77 Wn.2d 593, 597, 464 P.2d 723 (1970); *State v. Hurd*, 127 Wn.2d 592, 594, 902 P.2d 651 (1995). The reviewing court will not reverse the trial court's decision unless the appellant makes "a clear showing...[that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Downing* at 272, citing *State ex.rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). More specifically, a trial court's discretion in granting or denying a motion to continue will be disturbed "only upon a showing that the accused has been prejudiced and or that the result of the trial would likely have been different had the continuance not been denied." *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 1088 (1974), citing *State v. Edwards*, 68 Wn.2d 246, 412 P.2d 747 (1966); *State v. Moore*, 69 Wn.2d 206, 417 P.2d

859 (1966); *State v. Schaffer*, 70 Wn.2d 124, 422 P.2d 285 (1966); *State v. Derum*, 76 Wn.2d 26, 454 P.2d 424 (1969). "...[T]here are no mechanical tests for deciding when the denial of a continuance violates due process, inhibits a defense, or conceivably projects a different result; and, that answer must be found in the circumstances present in the particular case." *Eller* at 96, citing *State v. Cadena*, 74 Wn.2d 185, 443 P.2d 826 (1968).

> In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.

*Downing* at 273.

In his first assignment of error as well as his first issue pertaining to assignments of error, Dunne claims that the State endorsed Marilyn Howell as a witness on the "day of trial." See Brief of Appellant at pages 1 and 2. This is not the case. As Dunne acknowledges in his statement of the case, the State notified defense counsel that it would be calling an expert on the dynamics of domestic violence on March 8, 2011, two weeks prior to trial. See Brief of Appellant at page 9. Dunne then correctly notes that on March 15, 2011, the State named Marilyn Howell as its expert. Id. Later, Dunne incorrectly claims that he filed a motion to continue the case on the morning of trial, however his motion to continue was actually filed and heard by the court on March 17, 2011. CP 172-73, RP 88-95. Dunne

did *not* renew his motion to continue on the day of trial, nor did he report to the court any progress or effort he made in finding an expert.

The trial court did not abuse its discretion in denying Dunne's motion to continue. First, defense counsel made no effort prior to trial to find an expert. If Dr. Kirk Johnson had admissible testimony to offer in rebuttal of Dr. Howell's testimony, defense counsel could have picked up the phone and called him any time between March 8th, when he learned an expert would be called and March 21st, the day of trial. The trial court specifically told defense counsel that if he could procure an expert to offer testimony to rebut the State's expert he should advise the court as soon as possible and the expert would be permitted to testify. RP 95. Although defense counsel proffered an expert witness nearly a month after the conclusion of the trial, this does not negate the reasonableness of the trial court's decision nor render his exercise of discretion improper. Defense counsel offered no explanation or excuse for why he did not contact Dr. Johnson until on or about April 14, 2011. Moreover, Dr. Johnson was not prepared to offer admissible testimony. The notion that the trial court could compel the victim to submit to forensic analysis by a defense expert to determine her veracity was, as the trial court observed, absurd. Credibility determinations are for the trier of fact alone. *State v Camarillo*, 115 Wn.2d 60, 72, 794 P.2d 850 (1990).

Dunne claims in his brief that "the defense was eventually able to consult with its own domestic violence expert, who had *specific* criticisms of the conclusions state and the state's experts drew." See Brief of Appellant at page 27. Again, this is not the case. Defense counsel's post-trial declaration regarding his proposed expert pertains almost entirely to the proposed "forensic assessment" that Dr. Johnson would perform on the victim. It is not until the final paragraph that defense counsel addresses the possibility that his expert would rebut the State's expert:

> Even if the Court chose not to allow Dr. Johnson to perform a Forensic Assessment, he could still be available as a defense expert to respond to the many comments by the State's DV expert. This would tend to balance the trial by allowing the jury to understand there're at least two sides to the claims from the complaining witness, and to avoid a one-sided path to judgment.

CP 388-89.

Contrary to the defendant's claim in his brief, his proposed expert had no "specific criticisms" of Dr. Howell's testimony. He merely argued in his motion that if the State gets to bring an expert so should he—without regard to the admissibility or relevance of the proposed testimony. The trial court did not abuse its considerable discretion in denying Dunne's motion to continue. Dunne's failure, additionally, to renew his motion on the day of trial strongly suggests that he was not prejudiced by

the court's decision. Dunne has not demonstrated that the result of the trial would likely have been different had the court granted the motion to continue. The trial court did not err.

II. THE DEFENDANT'S RIGHT TO CONFRONT A WITNESS WAS NOT VIOLATED WHEN THE TRIAL COURT PREVENTED DEFENSE COUNSEL FROM ELICITING TESTIMONY THAT CALLED FOR THE WITNESS TO SPECULATE ABOUT WHETHER THE SEXUAL INTERCOURSE BETWEEN THE VICTIM AND THE DEFENDANT EXCEEDED THE SCOPE OF THE VICTIM'S CONSENT.

Dunne complains that the trial court would not allow his attorney to ask Dr. Herzig whether the victim's injury was more likely than not a result of consensual sex. See RP 226. The trial court did not err.

Both the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine adverse witnesses. *State v. Perez*, 139 Wn.App. 522, 529, 161 P.3d 461 (2007); *State v. McDaniel*, 83 Wn.App. 179, 185, 920 P.2d 1218 (1996). This right, which is of constitutional magnitude, is subject to two limits: First, the evidence sought to be admitted must be relevant and second, the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. *Perez* at 529; *McDaniel* at 185. The court's decision to

determine the scope of cross-examination is discretionary and will not be disturbed absent a manifest abuse of that discretion. *Id.* As with scope, the extent of cross-examination is also discretionary with the trial court. *Perez* at 530; *State v. DeCaston*, 5 Wn.2d 73, 78, 104 P.2d 756 (1940). Cross-examination that goes to the credibility of the witness or his ability to perceive must be given great latitude. *State v. Peterson*, 2 Wn.App. 464, 465-66, 469 P.2d 980 (1970); *State v. Tate*, 2 Wn.App. 241, 469 P.2d 999 (1970).

In *State v. Turnipseed* the Court of Appeals observed that there is a difference between "limitations on cross- examination within a given area that are based on nonconstitutional concerns-such as harassment, prejudice, confusion of the issues, repetition, or only marginal relevance which are reviewed for abuse of discretion, and whether the limitation of an area of questioning is so severe as to violate the confrontation clause, which is a question of law reviewed de novo." *State v. Turnipseed*, 162 Wn.App. 60, 68, n.4, 255 P.3d 843 (2011), citing *United States v. Larson*, 495 F.3d 1094, 1100-02 (9th Cir. 2007), *cert. denied*, 552 U.S. 1260 (2008). The State submits that this alleged error, if it occurred, was based on the nonconstitutional concerns of confusion of the issues and marginal relevance, and was not so severe a limitation as to be deemed a violation of the confrontation clause. Thus, the State submits that the proper

standard of review to be applied in this case is abuse of discretion rather than review de novo. However, Dunne's claim should fail under either standard.

The question at issue here was improper and there was no way that Dr. Herzig could answer such a question. The question called for him to speculate and was of marginal relevance. While Dr. Herzig did testify that such an injury was an "unusual" result of consensual sex, this was a fact that is within the common experience of any lay person and certainly didn't need to be rebutted with speculative testimony about whether *this* injury was the product of consensual sex. Additionally, the victim told Dr. Herzig, albeit in different words, that the injury had been sustained during consensual sex. The jury heard the victim's statement to that effect, and it simply didn't matter what Dr. Herzig believed. Dunne was given an opportunity to conduct meaningful cross-examination of Dr. Herzig and the trial court did not err by limiting defense counsel from asking a question that called for him to give a speculative and irrelevant answer. Dunne's Sixth Amendment and article 1, § 7 right of confrontation was not violated.

## III. THE STATE'S CLOSING ARGUMENT DID NOT SHIFT THE BURDEN OF PROOF.

Dunne claims that the following sentence uttered by the prosecutor during closing argument constituted misconduct: "And keep in mind that the Defense really has provided no explanation in this case for the injuries." RP 722. Dunne did not object to this remark.

In order to prevail on a claim of prosecutorial misconduct for a remark or argument that was not objected to a trial, the defendant bears the burden of demonstrating that the remark was so flagrant and ill-intentioned that is causes enduring prejudice and could not have been remedied by a curative instruction. *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005); *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied,* 514 U.S. 1129 (1995). "In determining whether the misconduct warrants reversal, we consider its prejudicial nature and its cumulative effect." *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). The reviewing court does not view allegedly improper comments out of context; rather, they must be viewed in the context of the entire argument. *State v. Larios-Lopez*, 156 Wn.App. 257, 261, 233 P.3d 899 (2010); *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

It is well settled that a defendant has no duty to present evidence. The State bears the burden of proving each element of its case beyond a

reasonable doubt. *State v. Traweek*, 43 Wn.App. 99, 107, 715 P.2d 1148 (1986). However where a defendant does present evidence, his evidence is subject to adversarial testing. A prosecutor is permitted to comment on a defendant's failure to support his own factual theories. "When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114 (1990). In *Traweek*, supra, the defendant did not testify or call any witnesses. *Traweek* at 106-07.

Dunne claims that State "did comment on [his] failure to present evidence when it made the [above noted] comment during closing argument." See Brief of Appellant at page 34. This comment is baffling because Dunne presented seven witnesses in his case and testified on his own behalf. He presented evidence, and that evidence was properly subject to adversarial testing.

Although Dunne takes one sentence of the prosecutor's argument to support his claim, the entire argument must be examined. During this portion of closing argument the prosecutor was talking about Dunne's theory that Crystal fabricated the allegations against him. See RP 722. Dunne denied ever strangling Crystal, yet three witnesses testified to

seeing marks or bruises on Crystal's neck and broken blood vessels in her eyes. Although Dunne offered absurd suggestions about how Crystal received a mark on her face during the New Year's Eve argument (that she fell before getting into bed and that he backhanded her *while* she was biting his tongue), he offered no explanation for her remaining injuries, which just happened to be injuries consistent with strangulation.

Dunne has not met his burden of demonstrating that the remark in question was either flagrant or ill-intentioned, or that it could not have been obviated with a curative instruction. The prosecutor was entitled to argue that Dunne's theory of the case was not credible and he did not shift the burden of proof to Dunne. The jury was instructed that the State bore the burden of proving each element of the offenses charged and the jury is presumed to follow the court's instructions. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211, 75 L. Ed. 2d 446, 103 S. Ct. 1205 (1983). Finally, the jury's verdict of not guilty as to Count one supports the inference that Dunne could not have suffered prejudice from this remark, even if it had been improper. Dunne's claim of prosecutorial misconduct fails.

## IV. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE IN THE JURY INSTRUCTIONS.

Dunne complains that certain jury instructions, to which he did not object, contained judicial comments on the evidence. He complains that jury instructions 24, 26, and 28, and ten special verdict forms found in CP 316-319, 321-322, 324-327, contained the term "victim" or "named victim" and that the use of these terms conveyed to the jury the court's opinion about the case. Dunne did not propose any contrary jury instructions. Dunne's claim is meritless.

Dunne should not be permitted to raise this claim for the first time on appeal. "The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.' *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) and *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Robinson* at 305, *McFarland* at 333; *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). "[P]ermitting appeal of all unraised constitutional issues

undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources." *Robinson* at 305.

As explained in *McFarland*, supra RAP 2.5(a)(3) is "not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court." *McFarland* at 333. In order to obtain review under RAP 2.5, the error must be "'manifest,'—i.e. it must be 'truly of constitutional magnitude.'" *Id.*; *State v. Scott* at 688. To be deemed manifest constitutional error, a defendant must identify the error and show how, in the context of the trial, the alleged error actually affected the defendant's rights. *McFarland* at 333. "It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record." *Id.* at 334.

Here, Mr. Dunne does not even attempt to establish manifest constitutional error affecting a constitutional right under RAP 2.5. He assumes without argument that his claimed error is reviewable for the first time on appeal as a matter of settled law. However, Dunne does not show actual prejudice.

This Court reviews jury instructions de novo, within the context of the instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "A judge is prohibited by article IV, section 16 of the state constitution from 'conveying to the jury his or her personal attitudes

toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'" *Id.* (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). "'The determination of a prohibited comment depends upon the facts and circumstances of each case.'" *State v. Alger*, 31 Wn. App. 244, 249, 640 P.2d 44 (1982) (quoting *State v. Painter*, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980)).

In *State v. Alger*, supra, the trial court read the following stipulation to jury: "'There has been a stipulation, that is an agreement between the State, the Plaintiff, and Mr. Alger and his lawyer, that Mr. Alger's age is 36, and, that he has never been married to the victim.'" *Alger*, 31 Wn. App. at 248-49. The Court of Appeals noted that, "[i]n the context of a criminal trial, the trial court's use of the term 'victim' has ordinarily been held not to convey to the jury the court's personal opinion of the case." *Id.* at 249. The Court held that while neither "encouraged nor recommended," "the one reference to 'the victim' by the trial court judge, did not, under the facts and circumstances of this case, prejudice the defendant's right to a fair trial by constituting an impermissible comment on the evidence." *Id.*

Here, the trial court did not use the term "victim" during the course of the trial. The jury members, moreover, were instructed that they were the sole judges of the witnesses' credibility. See CP 275. The jury was

also instructed that it was to disregard any comment the court may have made on the evidence. See CP 276. The jury is presumed to follow the court's instructions. *Grisby*, supra at 351.

Here, the use of the term "named victim" in the instructions and special verdict forms was clearly intended to be synonymous with "alleged victim." That defense counsel did not object to this term suggests that was his understanding as well. Analogously, the Delaware Supreme Court has concluded that the term *victim* "is a term of art synonymous with 'complaining witness'" for law enforcement. *Jackson v. State*, 600 A.2d 21, 24-25 (Del. 1991).

The instructions which used the term victim in instructions 26 and 28, moreover, do not refer to Crystal Engle as a victim. These instructions tell the jury that a defendant who has been deemed guilty of certain offenses may also be guilty of certain aggravators if certain conditions are met. They speak in the third person. Instruction 26 states "To find that Counts 1, 2, 3, 4, 5, or 6 manifested deliberate cruelty or intimidation ***of a victim*** in a domestic violence relationship..." CP 303 (emphasis added). Instruction 28 states "To find that Counts 3, 4, 5, or 6 were an ongoing pattern of abuse in a domestic violence relationship, each of the following elements must be proved beyond a reasonable doubt...that ***the victim***..." CP 305 (emphasis added). Dunne suggests that it is of no moment that the

jury does not turn to the special verdict instructions unless or until it finds the defendant guilty because, he claims, the court reads the instructions to the jury all at once. But again, the jury is presumed to follow the court's instructions and the jury was told in Instruction 24 that they were not to use the special verdict forms if they found the defendant not guilty. CP 300. This instruction preceded the instructions Dunne complains of for the first time in this appeal.

The court did not comment on the evidence in the jury instructions and Dunne's claim is without merit. Dunne's convictions should be affirmed.

## D. CONCLUSION

Dunne's convictions should be affirmed.

DATED this 11th day of May, 2012.

Respectfully submitted:

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# CLARK COUNTY PROSECUTOR

# April 26, 2012 - 2:59 PM

**Transmittal Letter**

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Case Name: State v. Christopher Dunne

Court of Appeals Case Number: 42149-6

**Is this a Personal Restraint Petition?** Yes ■ No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

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